

## **EPA News Highlights 5/30/2017**

### **Washington Examiner: Trump meets with Pruitt on Paris deal**

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### **The Hill: Trump meets with EPA chief on Paris climate pact**

President Trump met with his Environmental Protection Agency (EPA) chief ahead of his decision on whether to pull the U.S. out of the Paris climate change agreement. White House press secretary Sean Spicer announced the Tuesday meeting between the president and Scott Pruitt and said Paris was on the agenda.

### **The Hill: EPA chief puts new spotlight on cleanup program**

Environmental Protection Agency (EPA) head Scott Pruitt is looking to make a key federal program focused on cleaning contaminated sites an integral part of his agenda at the agency. With an eye toward expediting cleanups of contaminated sites and getting to work on languishing projects, Pruitt in recent weeks has formed a task force on the Superfund program and has issued a directive for the most expensive projects to go to him for approval.

### **BNA: EPA to Clear Backlog of New Chemical Approvals by July**

The backlog of new chemicals being reviewed by the Environmental Protection Agency is expected to be cleared by July due to staffing, policy and procedural changes the agency has made. Jeffery Morris, director of EPA's Office of Pollution Prevention and Toxics (OPPT), spoke with Bloomberg BNA about adjustments the agency has made that have cut the backlog of manufacturers' new chemicals requests.

### **InsideEPA: Hudson cleanup review may test Pruitt's plan for superfund cleanups**

EPA Administrator Scott Pruitt's promise to streamline and speed Superfund cleanups may be put to the test in the coming days as the agency decides whether to expand the scope of cleanup at the massive Hudson River, NY, site -- as sought by New York state and area lawmakers -- or to declare the sediment cleanup conducted so far to be sufficient. Pruitt has taken several steps to address what he says is the slow pace of the agency's remedy selection and cleanups...

### **InsideEPA: Legal fight could set precedent for expanding citizens' say in cleanups**

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### **Full Articles:**

Washington Examiner

<http://www.washingtonexaminer.com/trump-meets-with-pruitt-on-paris-deal/article/2624466>

**Trump meets with Pruitt on Paris deal**

By John Siciliano 5/30/17

President Trump met with Environmental Protection Agency Administrator Scott Pruitt on Tuesday to discuss the Paris climate change agreement, according to White House press secretary Sean Spicer.

"One of the topics they discussed was, of course, the president's upcoming decision of the Paris climate accords," Spicer said during a press briefing at the White House. The president is expected to make a decision this week on whether to withdraw from the agreement.

"Ultimately, he wants a fair deal for the American people, and he will have an announcement on that shortly," Spicer said.

"This is a subject that the president is spending a great deal of time on, and the one that he spoke to the G7 members about during their meetings," he said.

An Axios report over the weekend said Trump already told Pruitt he would leave the Paris Agreement, citing unnamed sources. Pruitt supports leaving the climate change agreement, while others in Trump's Cabinet, including Secretary of State Rex Tillerson, think withdrawing from the deal would not be wise.

The Hill

<http://thehill.com/policy/energy-environment/335665-trump-meets-with-epa-chief-on-paris-climate-pact>

**Trump meets with EPA chief on Paris climate pact**

By Timothy Cama 5/30/17, 3:36PM

President Trump met with his Environmental Protection Agency (EPA) chief ahead of his decision on whether to pull the U.S. out of the Paris climate change agreement.

White House press secretary Sean Spicer announced the Tuesday meeting between the president and Scott Pruitt and said Paris was on the agenda.

"This is a subject that the president is spending a great deal of time on, and one that he spoke to the G7 members about during their meetings," Spicer told reporters on Tuesday, referring to last week's summit of the Group of Seven leaders in Sicily, where Trump faced pressure from each of the other leaders to stay in the agreement.

"Ultimately, he wants a fair deal for the American people."

Trump announced over the weekend that he would reveal his decision on the Paris agreement this week.

Pruitt is an outspoken opponent of the agreement and wants Trump to abide by his campaign promise made just over a year ago to pull the United States out.

Pruitt has said in recent weeks that Paris is a "bad business deal" and an "America last" strategy. He said other major countries such as China and India are being held to much more lenient standards than the United States.

Later in his daily briefing, Spicer was asked whether Trump believes that human activity causes climate change.

"Honestly, I haven't asked him. I can get back to you," Spicer responded.

The reporter followed up, asking if Trump is still deciding on that question. "I don't know. I honestly haven't asked him that specific question," Spicer said.

The consensus of scientists who have studied the issue is that greenhouse gases, caused by human activity like burning fossil fuels, is far and away the primary cause of the global warming of recent decades.

Under the Paris pact, reached in 2015, nearly 200 nations agreed to nonbinding greenhouse gas emissions reductions that they each determined on their own. Former President Barack Obama, a leader in negotiating the deal, promised a 26 percent to 28 percent cut from the United States.

While Trump promised to exit the agreement, he has been under pressure since the election to stay in it. The forces pushing him to stay include Secretary of State Rex Tillerson, some big businesses such as Exxon Mobil Corp., which Tillerson once helmed, and his daughter Ivanka.

Over the weekend, Sens. Lindsey Graham (R-S.C.) and John McCain (R-Ariz.) added their names to the push to stay in the Paris deal.

But Axios reported that Trump has recently told people close to him that he plans to exit the deal.

The Hill

<http://thehill.com/policy/energy-environment/335383-epa-chief-puts-new-spotlight-on-cleanup-program>

**EPA chief puts new spotlight on cleanup program**

By Timothy Cama 5/29/17

Environmental Protection Agency (EPA) head Scott Pruitt is looking to make a key federal program focused on cleaning contaminated sites an integral part of his agenda at the agency.

With an eye toward expediting cleanups of contaminated sites and getting to work on languishing projects, Pruitt in recent weeks has formed a task force on the Superfund program and has issued a directive for the most expensive projects to go to him for approval.

Pruitt has also used the program's recent history to criticize the Obama administration, pointing out that the more than 1,300 sites on the EPA's priority list for cleanups is bigger now than it was when former President Barack Obama took office.

Superfund – a key program under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 – has broad, bipartisan support in Congress and elsewhere, owing to its mission of cleaning up contaminated areas and making them usable for commercial development.

Pruitt's focus on the program, therefore, could pay dividends for his political future – and he's unlikely to face strong opposition. But experts familiar with the program warn that his Superfund agenda could be ineffective or short-sighted, since it could lead to cleanups that are faster and cheaper but less thorough.

The EPA chief's critics argue that the real problem with the Superfund is funding, owing in part to the expiration of a tax on the oil and chemical industries that has expired.

The Trump administration could make the funding problem worse. President Trump's budget proposal this week sought a \$327 million cut – or 30 percent – to Superfund.

For the most part, the EPA uses the program to supervise cleanups funded by the companies responsible for the contamination. But if those companies are bankrupt or cannot pay, the EPA occasionally pays for the process, using taxpayer money, since the tax has expired.

To Pruitt, Superfund is a key example of a program where the EPA can make a real difference.

He's been working to dismantle many of Obama's major environmental regulations, like those limited carbon dioxide emissions from power plants and the federal power over waterways.

It represents a shift away from emphasizing large-scale environmental problems like climate change to more local, acute pollution challenges that Pruitt is judging as more urgent.

"We have about 1,322 Superfund sites across the country. And what's amazing about those Superfund sites is many of those sites have been listed on the National Priority List not for two years, not for four years, but sometimes, for decades," he said at a conference earlier this week.

"Yeah, some of the most important work that we do as an agency — or should be doing, better put — is with respect to the Superfund responsibilities," he told conservative radio host Hugh Hewitt earlier in May.

"Superfund sites, we have more today than when President Obama came into office," Pruitt said, citing the figure to argue that Obama had few, if any, environmental accomplishments.

Pruitt has also challenged the notion that he couldn't accomplish his Superfund goals with a significantly lower budget, arguing that money isn't the problem.

"I think a lot of this stuff is not money related, I think it's truly and management and leadership that's needed," he said at the recent conference. "And as money is needed, we're going to ask Congress for it."

Pruitt directed the agency to look at ways to make cleanups more effective and efficient, reduce costs and speed up both the EPA's internal processes and the cleanups themselves.

Any cleanups estimated to cost \$50 million or more must also get Pruitt's approval to ensure that the money is being well spent, among other priorities.

The policy has gotten mixed reviews, though even some critics are optimistic.

"I think this review is long overdue, and I think there are a number of people within EPA who wouldn't disagree," said Doug Arnold, an attorney with the firm Alston & Bird who represents industry clients, including companies that have had to pay for cleanups.

"I think within the regulated community, companies that have been part of either performing work under Superfund or funding work under Superfund would certainly agree that the process for getting properties remediated, in too many cases, takes too long," he said. "Administrator Pruitt is right to ask the EPA team to step back and think about whether there are any ways to improve the efficiency of the program."

"I think it's good that there is attention brought to it," said Sen. Mike Rounds (R-S.D.), who chairs the Environment and Public Works Committee's subpanel with responsibility for Superfund. "We have not done a lot of work on that in the last couple of years."

But Mathy Stanislaus, who led the EPA's land and emergency management office under Obama, said Pruitt's policies worry him.

"I worry that this is going to lead to cheaper remedies, remedies that leave more contaminants in place, more exposure in place," he said. "Which has the potential consequence of not just leaving exposure in place, but also delaying economic recovery."

Stanislaus said he was concerned, for example, that Pruitt's memos did not mention public health as a priority in the cleanups.

He said that it's always a good idea to look at efficiencies, but without more funding, it will be hard to get much done.

Obama proposed each year he was in office to reinstate the Superfund tax on oil and chemical companies, which funded orphan cleanups and expired in 1995.

Numerous Democrats, like Sen. Cory Booker (N.J.) and Rep. Frank Pallone (N.J.), have proposed bringing it back, but their push has gotten little traction.

"Every year, Congress has chosen not to pass that, and basically say that the taxpayers should pay for these, which I don't think makes any sense," Stanislaus said.

Stanislaus also criticized Pruitt for citing the number of Superfund sites on the priority list as a sign of Obama's failures.

The priority list is based only on measurements of the need for cleanup, he said.

"It completely fails to understand the program," Stanislaus said. "The fact is that listing on the site is exclusively based on a scientific evaluation of risk. There's a very methodical evaluation of risk."

Craig Johnston, a professor at Lewis and Clark College Law School who once worked on Superfund at the EPA and now studies the program, agreed that Pruitt's review could yield benefits.

But EPA has significant leeway in how it orders cleanups, and Johnston also worried that communities near sites would not be able to challenge ineffective actions.

"My fear is that he's going to say all of the decisions are going to come out of headquarters, and then drip by drip, we're going to see that they're much less protective remedies, and they'll be very difficult to challenge," he said.

EPA spokeswoman Amy Graham said that the fear of less protective cleanups is completely unfounded.

"The notion that streamlining and improving the Superfund program will somehow lead to less protective or effective cleanups is false. Applicable regulations require us to select remedies that will be protective to human health and the environment based on the anticipated future use of the site and other criteria," she said in a statement.

"That isn't changing as a part of this initiative. Unlike the previous administration that failed to prioritize the Superfund program, Administrator Pruitt is providing real leadership that will lead to better results at Superfund sites across the country."

BNA

[http://esweb.bna.com/eslw/1245/split\\_display.adp?fedfid=112765121&vname=dennotallissues&wsn=499309500&searchid=29965437&doctypeid=2&type=date&mode=doc&split=0&scm=1245&pg=0](http://esweb.bna.com/eslw/1245/split_display.adp?fedfid=112765121&vname=dennotallissues&wsn=499309500&searchid=29965437&doctypeid=2&type=date&mode=doc&split=0&scm=1245&pg=0)

#### **EPA to Clear Backlog of New Chemical Approvals by July**

By Pat Rizzuto 5/30/17

The backlog of new chemicals being reviewed by the Environmental Protection Agency is expected to be cleared by July due to staffing, policy and procedural changes the agency has made.

Jeffery Morris, director of EPA's Office of Pollution Prevention and Toxics (OPPT), spoke with Bloomberg BNA about adjustments the agency has made that have cut the backlog of manufacturers' new chemicals requests. The backlog is of pre-manufacture notices (PMNs) the agency is reviewing that currently exceeds its normal volume of about 300 pending requests.

The backlog peaked at about 600 PMNs at the end of 2016 following the overhaul Congress made to the 1976 Toxic Substances Control Act (TSCA) last June, Morris said. The backlog is now less than 150, EPA said.

Getting new chemicals to market helps industry and consumers because the new molecules typically enhance the performance of the products the chemicals make, Morris said in his first interview about the agency's efforts to speed its new chemical reviews. New chemicals often have a better environmental footprint by cutting energy consumption, hazardous waste, water pollution or other environmental benefits when compared to the chemicals they replace, he said.

#### **Critical Change**

The biggest change that the EPA's new chemicals office had to adjust to, Morris said, was the amended law's requirement that the agency make a specific conclusion about the risk each new chemical could pose.

Original TSCA did not require the agency to make specific conclusions about a new chemical's risks. If the agency did nothing during the 90 days the statute gives it to complete new chemical reviews, the molecule could be made or imported for any TSCA-regulated use under the 1976 statute. The amended law retains the 90-day review period, but requires the agency to make "affirmative findings" for each chemical.

The new requirement improved the law, because it enhances public confidence in the government's chemical oversight, Morris said.

The new procedures and policies the agency is implementing also should improve regulatory certainty, he said. An agency website lists possible conclusions the EPA can make including that a new chemical:

- Is "not likely to present an unreasonable risk" to the environment or people—including vulnerable or highly exposed populations;
- May pose an unreasonable risk that would be controlled before the chemical could be made or imported; or
- Has insufficient information to allow the agency to make "a reasoned evaluation" of its health and environmental effects.

Morris described the first six months after amended TSCA as a "real learning curve" as staff figured out how to make those determinations and explain them in ways diverse audiences could understand.

"It was a heavy lift," he said. But, "I'm very happy to say we're confident that by the end of July we will have eliminated the backlog."

#### Industry Describes Problem

In early April, Cal Dooley, chief executive officer for the American Chemistry Council, described in an Insights article for Bloomberg BNA the problems the agency's initial new chemical delays were causing.

New chemical evaluations had "become mired in inefficiencies, causing significant delay for manufacturers," Dooley, whose trade association represents companies including the BASF Corp., the Dow Chemical Co., and Honeywell, wrote.

Arkema Inc., which produces acrylic monomers, additives, hydrogen peroxide, coating compounds and other chemicals, is among the manufacturers that discussed its concerns about the new chemicals program as it met with Congressional lawmakers during the first quarter of 2017.

Arkema urged lawmakers to give the EPA sufficient resources for timely implementation of the amended TSCA's changes, including the new chemical provisions, the company said in a statement provided to Bloomberg BNA.

Giving sufficient EPA resources "can help the agency to evaluate and process the approval of pre-manufacture notices, to allow companies like Arkema to innovate and bring to market new materials that better meet the needs of users and consumers, or that deliver benefits such as enhanced sustainability," the company said.

## EPA's Staffing Solutions

The chemicals office tripled the amount of time its scientists focused on new chemicals, Morris said. About 70 scientists work in the program's Risk Assessment Division, he said.

"At any given time about half of those people are involved in some way or other in new chemicals," Morris said. The rest of the time the risk assessors focus on existing chemicals and questions arising in the agency that call for their particular expertise.

The chemical's office could boost risk assessors time on new chemicals, because it hadn't fully ramped up to begin the risk analyses amended TSCA requires it to undertake for chemicals on the U.S. market, he said.

Having reduced the new chemicals backlog, those same scientists are now focused on developing the scope of risk assessments the agency will conduct for 10 existing chemicals, including solvents, flame retardants and one dye. The scoping documents will describe what health and environmental concerns, exposures and other issues the agency's risk analyses will examine. Amended TSCA requires EPA to complete those scoping documents by June 19.

The agency also temporarily transferred to the new chemicals program about 15 individuals who manage each chemical's review, Morris said. Those individuals work with the agency's scientists, manufacturers and importers who've submitted new chemical requests. The managerial staff will shift back to other duties once the new chemicals backlog is cleared in July, Morris said.

## First Major Policy Change

"We've made policy changes that not only reduce the backlog, but make sure a backlog doesn't occur again," he said.

A critical change the agency has made is to approve a new chemical for a particular use or uses its manufacturer or importer intended, along with reasonably foreseeable uses, he said.

If the agency has concerns because the new chemical could be made, used or released into the environment in ways other than what its original manufacturer intended, it will restrict those uses through significant new uses rules, called SNURs, Morris said.

Chemical manufacturers have urged the agency to use this mechanism, commonly called a "non-5(e) SNUR," as it implements amended TSCA just as it had under the original law. That specific provision refers to the section of TSCA that gives EPA oversight of new chemicals and a type of regulation it can issue. The term also refers to the EPA's conclusion that intended or reasonably foreseen uses of a new chemical would not likely present an unreasonable risk, but that other manufacturing methods or uses might, leaving the door open in case other firms employ them.

Initially, the EPA needed time to make sure it could make a legally supportable argument that the amended law allowed it to continue making such findings, Morris said.



"We determined it's legally supportable," provided needed restrictions would be in place before the new chemical was made or imported and that those restrictions protect human health and the environment, Morris said.

Being able to issue non-5(e) SNURs will allow a significant number of new chemicals that had been part of the backlog to get to market, he said.

#### Two Agency Actions Must Align

Before a new chemical could be made or imported, however, the EPA must align two coupled activities.

First, the agency must work with each manufacturer or importer to determine the manufacturing methods for, environmental releases of, and uses of, the new chemical that would not be likely to pose an unreasonable risk. A consent order negotiated between the agency and the original manufacturer or importer then binds that specific company to the agreed upon manufacturing and use conditions.

Second, the conditions that the EPA concludes would result in the chemical being unlikely to pose an unreasonable risk must be applied to any subsequent manufacturer or importer that could make the chemicals, Morris said. The agency does that through SNURs.

The chemicals office is developing a strategy to align the two related actions: approving the original manufacturer's request to make a new chemical and issuing a rule that would require subsequent manufacturers to meet any restrictions the original company agreed to, he said.

The goal, Morris said, is to allow the original manufacturer to get a "not likely to pose an unreasonable risk" finding, while making sure restrictions are in place to prevent risks that might occur if other companies made or used the chemical in different ways.

#### Polymers

Similarly, the EPA is allowing certain polymers to get to market quicker than it did in the initial months after TSCA was amended when they are unlikely to cause health or environmental concerns due to their large size and other characteristics.

Under the original and amended TSCA, EPA has allowed such polymers to be made under what was called a "polymer exemption." That means the company could make the new polymer without filing a new chemicals notice provided the chemical met specified criteria. The EPA's rationale is that the polymer exemption encourages the manufacture of safer polymers by reducing industry's reporting burden for these types of chemicals. The reduced burden allows the EPA to concentrate its new chemical resources on substances that could pose higher risk, an EPA website explains.

Yet sometimes polymer manufacturers choose to submit new chemical notices. Or perhaps the molecule's characteristics show it could raise concerns if it were made in ways that produced smaller chemicals, called monomers, which could enter and interact with biological systems. The EPA has determined it can allow polymers, which could qualify for the exemption, into commerce with a proviso, Morris said. When the new polymer is added to the TSCA inventory—which lists chemicals that are or have been in U.S. commerce—it will have a flag saying the chemical must be made

in ways so that it couldn't be biologically available, Morris said. The EPA announced its first such conditional approval on May 12.

#### Useful Data For EPA to Get

Another change Morris described has been requested by many chemical makers and the attorneys and trade associations that represent them.

The agency will publicize information manufacturers could submit with their pre-manufacture notices to speed the agency's reviews, he said.

Neither original nor amended TSCA requires manufacturers to submit specific toxicity, exposure or other data when they ask the agency to allow them to make a new chemical.

Faced with a lack of information about use conditions—such as the amount of a chemical that would be released to water, whether workers would be shielded from exposure because the new chemical would be made in a closed system, or whether workers would be required to wear protective gear—the agency makes assumptions. Those “default assumptions” are contained in software the agency uses, for example, to model how much of a chemical may be released in the workplace or what could happen to fish and the bugs they eat if the chemical got into water. To be protective, the agency assumes a new chemical would be released in greater quantities or that exposure is higher than it may be.

The consequence, Morris said, is that the EPA, manufacturers and importers spend time going back and forth working out more realistic use conditions. Depending on how confident a manufacturer is about its potential market for a new chemical, it may choose to pay to generate exposure or other data to prove to the agency that a chemical is less toxic or that exposure to it would be less than the agency assumes. Agency concerns and the cost of generating new data may also prompt a manufacturer to withdraw its new chemical notice rather than face potential controls.

Alerting firms about data needs means “we'll have a much greater chance of receiving information that will allow us to run scientific analyses one time and get companies on the road to commercialization,” Morris said.

The EPA also is encouraging chemical makers to meet with agency staff before they submit a pre-manufacture notice, to spotlight data the agency needs before a new chemical's review begins, Morris said.

#### InsideEPA

<https://insideepa.com/daily-news/udson-cleanup-review-may-test-pruitt%E2%80%99s-plan-superfund-cleanups>

#### **Hudson cleanup review may test Pruitt's plan for superfund cleanups**

By Suzanne Yohannan 5/30/17

EPA Administrator Scott Pruitt's promise to streamline and speed Superfund cleanups may be put to the test in the coming days as the agency decides whether to expand the scope of cleanup at the massive Hudson River, NY, site -- as sought by New York state and area lawmakers -- or to declare the sediment cleanup conducted so far to be sufficient.

Pruitt has taken several steps to address what he says is the slow pace of the agency's remedy selection and cleanups, including centralizing decisionmaking in the administrator's office for remedies costing more than \$50 million, an approach that several sources have interpreted as an attempt to rein in costly mega-site sediment and mining cleanups.

He also issued a May 22 memo outlining his Superfund efficiency initiative, with a focus on streamlining cleanup at contaminated sediment sites to "ensure that risk-management principles are considering the selection of remedies."

Both of those measures could be tested as the agency must complete by June 1 its five-year review of the Hudson River sediment cleanup.

General Electric (GE), the potentially responsible party at the site, completed a six-year, \$1 billion-plus sediment cleanup of the river in 2015. It required dredging and the removal of more than 2.6 million cubic yards of sediment contaminated with polychlorinated biphenyls (PCBs) over a 40-mile stretch of river, stemming from two electrical capacitor manufacturing plants that operated along the river for decades. EPA estimated that GE discharged 1.3 million pounds of PCBs into the river.

Such remedies have long been opposed by industry groups, who charge they are costly and resuspend contaminants in the water column. Instead, they favor less costly remedies that allow for capping contamination with clean sediment and allowing for natural attenuation.

The original 2002 remedy was signed by then-EPA Administrator Christine Todd Whitman and then-Region II Administrator Jane Kenny.

While an EPA source says Pruitt's decision to oversee costly remedy decisions does not extend to five-year reviews like those at the Hudson site, an EPA Region 2 spokesman says the review will be signed by Acting Deputy Regional Administrator Walter Mugdan after consultation with "senior agency officials."

Nonetheless, EPA's decision on whether to require more active cleanup at the Hudson site -- an already over \$1 billion cleanup -- could signal how the agency addresses such large, sediment-site cleanups under the Trump EPA.

But environmentalists are already skeptical that the agency will continue to pursue aggressive cleanups. "Pruitt's [May 22] directive that 'sound risk management principles' be considered when selecting remedies, particularly at contaminated sediment sites, suggests that he questions the dredging of contaminated sediment at mega-sites such as the Hudson River," Lenny Siegel, executive director for the Center for Public Environmental Oversight (CPEO), says on his group's listserv commenting on the May 22 memo.

And an industry source says regarding Pruitt's possible direction on sediment sites, "we can only hope EPA does not repeat mandating costly remedies, like the upper Hudson, or lower Passaic" River in New Jersey, where natural attenuation is slowly addressing the contamination. The source says that active dredging aggravates exposures to the contaminants.

#### **Hudson Decision**

The Hudson River site's review has been getting significant attention, with lawmakers appealing to Pruitt earlier this month to acknowledge data showing the current cleanup is not protective, and to endorse additional cleanup. New York state, which conducted its own review, is also pushing for a more thorough cleanup.

It is unclear how the push from these outside entities will impact EPA's decision just as Pruitt has touted his plans to rein in the time spent on Superfund cleanups in general.

In his May 22 memo to various EPA officials, including regional administrators, Pruitt says that in his conversations with lawmakers, governors, local officials and concerned citizens, "I have heard that some Superfund cleanups take too long to start and too long to complete. The process of evaluating the contamination at a site and developing the appropriate remedy can take years -- if not decades -- delaying remediation of the site and withholding the full beneficial use of the area from the local community."

He added that in addition to centralizing decisionmaking, he is also creating a task force to make recommendations within 30 days on restructuring the cleanup process and promoting quick remediation, while lowering the burden on cooperating parties, encouraging private investment in cleanups and promoting revitalization of remediated properties.

The memo in part calls on the task force to "[s]treamline and improve the remedy development and selection process, particularly at sites with contaminated sediment, including to ensure that risk-management principles are considered in the selection of remedies at such sites."

And he also underscored the need for consistency in remedy selection.

That is welcome news for one industry attorney familiar with sediment cleanups in the western United States, who says remedies in contaminated rivers in the West tend to be more stringent than those in the East, such as the Hudson, due to higher fish consumption estimates.

The source says there are dramatic differences, for instance, between EPA's numeric standards for cleanups of New York's Hudson River and much stricter limits for Washington's Duwamish River. Liable parties at the Duwamish cleanup would be "very happy" with the Hudson site's standards, the source says.

While industry is welcoming Pruitt's suggestions of softening cleanup requirements, Pruitt is facing heavy pressure from lawmakers, the state of New York and stakeholders around the Hudson site to require GE to do more.

In a May 23 letter from Sen. Kirsten Gillibrand (D-NY) and several House members, the lawmakers press Pruitt to incorporate into the five-year review data showing the remedy is not protective of human health and the environment, and to rely on the five-year review as an "opportunity" to seek more cleanup of the river.

"The review presents an opportunity to realize goals that you have articulated, including the importance of cleaning up the Hudson River pollution and ensuring the Superfund program succeeds in achieving both environmental outcomes and creating jobs." They ask him to secure additional cleanup of the Upper Hudson. The letter was also signed by Reps. Paul Tonko, Nita M. Lowey, Eliot Engel and Sean Patrick Maloney, all Democrats representing New York districts.

They note that after the cleanup plan was created, "EPA discovered that at least 2-3 times more PCB contamination existed in Hudson River sediments than had been assumed; yet EPA did not modify the scope of the cleanup." Therefore, the river's contamination remains in far exceedance of cleanup targets, they say.

They contend that as a result, the "dark cloud of toxic pollution" stifles economic development on the Upper Hudson River.

Further, the lawmakers point to a New York State Department of Environmental Conservation (DEC) report released earlier this year that urges EPA to strengthen the cleanup requirements in the five-year review.

The recommendation marks a dramatic reversal for the state, which last year threatened to withdraw its support for the remedy if the five-year review were to show it failed to abate PCB threats to human health and the environment.

Now, after an independent evaluation of data for the site, the DEC in its report says that it has found the dredging remedy implemented is not protective of human health and the environment, due to uncontrolled exposures to human and ecological receptors that exceed the agency's acceptable risk range.

DEC recommends that EPA undertake a detailed evaluation of the action plan; increase sediment and fish tissue sampling in order to optimize the remedy through additional remediation; expand the investigation of the site for the portion of the site from Troy to the Battery in New York City; and evaluate cleanup alternatives to address uncontrolled exposures, the lawmakers say of the recommendations.

The lawmakers say PCBs from the Upper Hudson continue to be transported downriver, and say that PCB levels in fish in the lower part of the river "are not declining as expected, pointing to the need for investigation of downriver contamination and appropriate remedial action. New Yorkers must not be left holding the bag for contamination that will render the Hudson River a Superfund site for generations to come," they add. -- *Suzanne Yohannan* ([syohannan@iwpnews.com](mailto:syohannan@iwpnews.com))

InsideEPA

<https://insideepa.com/daily-news/legal-fight-could-set-precedent-expanding-citizens-say-cleanups>

**Legal fight could set precedent for expanding citizens' say in cleanups**

By Suzanne Yohannan 5/30/17

Legal advocacy groups for citizens around a high-profile Superfund site in Indiana are asking a federal district court to set aside a magistrate judge's order rejecting their attempt to intervene in a cost recovery cleanup settlement there, with the groups seeking a ruling that could set precedent in boosting citizens' say in such cleanup accords.

At issue is an attempt by citizens around the USS Lead Superfund Site in East Chicago, IN, to intervene in a consent decree between EPA and two industrial potentially responsible parties (PRPs) governing a cleanup remedy at the former lead smelter site.

"The Magistrate's Opinion and Order denying the Motion does not discuss in detail the harm suffered by the residents or the interest they have in the future clean-up activity -- including impacts to their health and/or property values," the citizens say in a May 16 brief filed with the U.S. District Court for the Northern District of Indiana. "Instead, the Opinion's sole basis for denying Applicants' Motions to Intervene was that the residents did not act quickly enough."

According to attorneys involved in the case, the district court will now review the magistrate's decision *de novo*.

The site gained national attention last year after East Chicago officials gave notice that they were requiring demolition of a public housing project on part of the site upon learning from EPA of high residential lead-in-soil levels.

EPA informed the officials of the high lead levels several years after the site was placed on the National Priorities List in 2009 and despite multiple requests for information that officials say were ignored. Some properties at the site have tested at levels as high as 27,100 parts per million (ppm) for lead, more than 60 times the hazard level, according to the citizen litigants.

The residents, represented by two university law clinics and a law firm conducting *pro bono* work, have been seeking to intervene in a 2014 consent decree in an attempt to push EPA to recognize the various sources of lead that can burden an environmental justice community. The citizens want EPA to more broadly address cumulative impacts for lead at the site.

If the litigation is successful, it could set a precedent for expanding citizens' voice in cleanups. It could effectively push EPA and PRPs at sites to give greater consideration to citizens' concerns when negotiating consent decrees, says Mark Templeton, a law professor at the University of Chicago who represents the citizens in the lead cleanup, in an interview with *Inside EPA*.

Citizens have a right to intervene, he says. Their voices need to be heard by the courts because the courts play an important role in ensuring that the federal government and PRPs are doing what needs to get done to make sure citizens' interests are represented in the cleanup, he adds.

He says that if the litigation is successful, "I also think this will push EPA and PRPs to do a better job in the first place" when negotiating these agreements to think about the public health interests of citizens. In addition, David Chizewer, an attorney with the law firm Goldberg Kohn working *pro bono* for the citizens, says that if the litigation is successful, he hopes that legal advocacy groups will see legal intervention as a viable option.

### **Potential Intervention**

If the citizens are allowed to intervene, then that will confer on them an opportunity to respond to decisions by EPA and PRPs with respect to the consent decree, Chizewer says. Such a ruling would also allow the citizens to file their own motion to seek modification of the consent decree if they believe the facts warrant it, he says.

One aspect of the magistrate's ruling does favor such citizen suits and could set a precedent if endorsed by the district court. This relates to the magistrate's finding that the Comprehensive Environmental Response, Compensation & Liability Act's (CERCLA) bar on pre-enforcement review of ongoing remedial actions does not prohibit the citizens at the site from reviewing the cleanup by way of intervention in

the underlying CERCLA action. If the district court adopts this finding, that could be a "helpful precedent" for other courts to cite, although it would not bind any other courts, Chizewer says.

But Magistrate Judge Paul R. Cherry, with the U.S. District Court for the Northern District of Indiana, in a May 2 opinion and order nonetheless on other grounds denied the citizens' motion from last November to intervene in *U.S. v. Atlantic Richfield Company, et al.*

The citizens in their initial legal brief argued that EPA selected a flawed remediation plan that left out one of the three residential areas of the site and further alleged that EPA did not properly execute the remediation plan. Among their contentions, they argued that EPA's remedial investigation set inadequate cleanup levels for arsenic and lead, and failed to assess comprehensive exposures, such as lead paint issues, indoor dust or drinking water, and failed to assess blood lead levels of residents -- lapses the litigants say contradict EPA's guidance in its Residential Lead Handbook.

But the Justice Department (DOJ) on behalf of EPA has opposed intervention, arguing the citizens failed to meet the standard for intervening on several grounds, including that the request is not timely as it was filed two years after the Atlantic Richfield case was settled and closed.

In addition, DOJ pointed to CERCLA section 113(h), which bars judicial review of ongoing cleanup remedies, as a further obstacle to the residents' litigation. "[T]his Court does not have jurisdiction to grant the relief the Applicants seek," DOJ says.

But the magistrate judge rejected DOJ's argument that the court lacks jurisdiction to grant plaintiffs' relief because of CERCLA's 113(h) bar. The bar does not apply under certain exceptions, one of which is if the action falls under a section 107 cost recovery action.

Cherry says that while "the challenge itself is not one of the listed exceptions, the first claim for relief in the Complaint that initiated this litigation is for cost recovery under [section 107]." Therefore, if the citizens are permitted to intervene, their challenge to the remedial action, "by virtue of the original Complaint," is "'in an action' covered by the exception found in" CERCLA section 113(h)(1).

The magistrate judge, however, found that the motion to intervene fails because it was untimely. "Applicants knew about their interest in this now-closed litigation for years before filing the motion, the existing parties would be prejudiced if Applicants were able to relitigate these settled matters, Applicants have already been given the opportunity to present their objections to the Court and will suffer little prejudice if their motion is denied, and permitting intervention could endanger public health," he said.

#### **'Timeliness Factors'**

But in an applicants' objection to the magistrate's opinion and order, the citizens argue that the district court should grant their motion, arguing that the magistrate ignored case law that points to weighing factors generally in favor of supporting intervention rights. Instead, they say, the magistrate favored "a hollow application of the timeliness factors."

Specifically, they point to four factors the U.S. Court of Appeals for the 7th Circuit established when weighing the timeliness of a motion. These are: "(1) the length of time the intervenor knew or should have known of his or her interest in the case; (2) the prejudice caused to the original parties by the

delay; (3) the prejudice to the intervenor if the motion is denied; and (4) any other unusual circumstances."

Cherry's conclusion that a July 2012 technical notice on a recommended cleanup plan for residential areas "advised Applicants of a need to intervene in litigation that would occur two years later does not comport with the law or the constraints facing this environmental justice community," the citizens say in their objection. "Rather, it imposes an impossible burden on Applicants that renders their rights meaningless."

Chizewer points out that there is no statute of limitations in weighing timeliness for intervention, noting "it's a liberal standard" with the goal in mind of giving people most interested in a case the right to intervene.

The citizens' new brief says the magistrate's opinion "raises an important question: When a community has been subject to decades worth of pollution and delay, how quickly should the community be required to act to enforce its legal rights?"

"[B]lasting a 'fact' sheet to the community, issuing a press release subject to the whim of reporter and resident reading habits, and resorting to notices in the *Federal Register* are not adequate or realistic ways to inform under-resourced individuals about the specific level and extent of contamination tainting their properties," the brief says.

The citizens also say that the opinion dismisses "the fact that residents did not learn about the contamination of their *individual* properties until the fall of 2016." -- Suzanne Yohannan ([syohannan@iwpnews.com](mailto:syohannan@iwpnews.com))